

In the Competition Appeal Court of South Africa

In the matter of

Case 51/CAC/Jun05

Omnia Fertilizer Limited

Applicant

and

**The Competition Commission
Sasol Chemical Industries Limited
Kynoch Fertilizer (Pty) Limited
Nutri-Flow CC
Nutri-Fertilizer CC**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent**

and in the matter of

Case 52/CAC/Jun05

Sasol Chemical Industries Limited

Applicant

and

**The Competition Commission
The Competition Tribunal
Nutri-Flow CC
Nutri-Fertilizer CC
Kynoch Fertilizer (Pty) Ltd
Omnia Fertilizer Limited**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent**

JUDGMENT

Delivered on 28 April 2006

Malan AJA et Patel AJA:

[1] In November 2002 the first respondent (“the Commission”) received a complaint (“the first complaint”) from Nutri-Flo (the Nutri-

Flow corporations) will be referred to as (“the complainants”) in which allegations were made that the applicant in case 52/CAC/Jun05 (“Sasol”) had made itself guilty of contraventions of the Competition Act 89 of 1998 (“the Act”).

[2] The Commission decided not to refer the complaint to the Tribunal and during October 2003 recorded its decision in a certificate of non-referral. The reason for the non-referral was that, after investigating the complaint, insufficient evidence was found to warrant such referral. If the Commission issues a notice of non-referral in response to a complaint, the *complainant* may refer the complaint directly to the Tribunal (s 51(1)). The complainants in this matter did not do so.

[3] The complainants lodged a fresh complaint (“the second complaint”) on 3 November 2003 and launched proceedings for interim relief pending the determination of the complaint. Two further respondents were included in this complaint, viz Kynoch and Omnia. Nothing came of these proceedings.

[4] The second complaint was investigated by the Commission and eventually on 4 May 2005, referred to the Tribunal. Due to time constraints the Commission had obtained the consent of the complainants to two extensions of the prescribed time periods allowed for the investigation. The first extension agreed to by Nutri-Flo is dated 23 October 2004 and extends the expiry date of the investigation to 28 February 2005. The second is dated 15 February 2005 and extends the expiry date to 30 April 2005.

[5] In two separate applications Sasol and Omnia seek to review and set aside the referral of the second complaint on the ground that it is *ultra vires* and or unconstitutional since it was made out of time, the second extension of time being incompetent and a nullity; and in breach of the Constitution since the Commission had acted

oppressively in making a press statement at the time of referral thereby divulging confidential information pertaining to Sasol. In addition, Sasol seeks to review the referral of the second complaint on the ground that it deals substantially with the same complaint the Commission had issued a certificate of non-referral in respect thereof.

[6] The first question is whether the Commission acted within its powers when it referred the second complaint to the Tribunal. This calls for an interpretation of s 50 of the Act :

‘(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.

(2) Within one year after a complaint was submitted to it, the Commissioner must–

(a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or

(b) in any other case, issue a notice of non-referral to the *complainant* in the *prescribed* form.

(3) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)(a), it –

(a) may –

(i) refer all the particulars of the complaint as submitted by the complainant;

(ii) refer only some of the particulars of the complaint as submitted by the complainant; or

(iii) add particulars to the complaint as submitted by the complainant; and

(b) must issue a notice of non-referral as contemplated in subsection (2)(b) in respect of any particulars of the complainant not referred to the Competition Tribunal.

(4) In a particular case –

(a) the Competition Commission and the *complainant* may agree to extend the period allowed in subsection (2); or

(b) on application by the Competition Commission made before the end of the period contemplated in paragraph (a), the Competition Tribunal may extend that period.

(5) If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2), or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.'

[7] The interpretation of s 50 arose for decision in *Sappi Fine Papers (Pty) Ltd v Competition Commission* (62/CR/Nov 02) where the Tribunal held that multiple extensions of the period referred to in s 50(2) were possible. The reasons for coming to this conclusion are the following:

‘20. The respondent argues firstly on a textual approach that the use of the words ‘the period’ presupposes a single period of extension. This it argues is reinforced by the fact that the power to extend in section 50(4) is to ‘extend the period allowed in subsection (2)’. Since this period is a period of one year the legislature only contemplated an extension to the period of one year and not an extension to the one year plus any previous periods of extension.

21. The respondent argues that the reason that the statute does not permit multiple extensions is that otherwise a respondent would be prejudiced by a never-ending series of extensions which would mean that the case against it would never reach finality.

22. The Commission argues that the statute is silent on this point and that indeed if there is nothing in the statute to prevent them from making use of more than one extension, we should not read such a stricture in. The Commission argues that where the legislature had intended a single extension period it had expressly done so in section 14, the section dealing with merger control. In section 14(1)(a) it states that the Competition Commission ‘may extend the period in which it has to consider the proposed merger by a single period not exceeding 40 business days and, in that case, it must issue an extension certificate to any party who notified it of the merger’.

23. We are persuaded by the Commission’s argument. There is nothing in the express wording of the text of section 50 to preclude multiple extensions. In order to be valid, however, the extensions must be granted before the expiry of the previous period otherwise the chain will be broken. There is no suggestion that the chain of extensions in this case has been interrupted by a period for

which a prior consent had not been granted.

24. The difference in the text in sections 14 and 50 is significant to serve as interpretative guide. Both were introduced as part of the same amendment and therefore we can assume that when the legislature applied its mind to the issues of extensions of both merger considerations and complaint referrals it was mindful of requiring a single extension period with the former, but not with the latter. What is also significantly different about section 14 is that the requirement of a single period is coupled with a stipulation that the extension may not exceed 40 days. Section 50(2) is silent on how long the period of extension may run.

25. The absence of these features in section 50 suggests that the legislature had not intended to provide for only a single period of extension for the reasons suggested by the respondent. If it had considered it necessary, the logic would not be merely to restrict the Commission to a single extension but also to impose a time cap on that extension. If the legislature was concerned about the danger of the abuse of multiple extensions it would surely have provided for this expressly coupled with a cap on the period for extension. Without a cap the period of extension is academic. A single period of several years is surely more prejudicial to the respondent than a multiple series of extensions that does not extend beyond three months. The only distinction between the two is that under the former the respondents know when the end of the period is whilst under the latter the endpoint remains uncertain. The distinction would make little practical distinction as if the Commission had only a single period of extension it would always bargain for the longest period *ex abundante cautela*, even if it only needed a much shorter period. A respondent's uncertainty is hardly alleviated by this.

26. The real explanation for the time cap on the Commission imposed by section 50 is not to protect a respondent but a complainant. The complainant has no right to proceed with its own complaint referral unless it has a certificate of non-referral from the Commission. If the Commission is dilatory in its investigative function a complainant might wish to bring the case itself, but it cannot do so without a certificate of non-referral. Furthermore without a decision from the Tribunal declaring the conduct in question a restrictive practice it cannot bring a case for damages in a civil court. What the legislature intended was to impose some restriction on the Commission's prerogative to bring a complaint

referral in its own good time – it was thus meant to balance the Commission’s public right to be the preferred prosecutor, with the private right of a complainant to get its dispute heard. For this reason the complainant can refuse to agree to the extension and then the Commission has to apply to the Tribunal for an extension.

27. If the legislature had intended to protect the respondent by this mechanism it would surely have done so expressly.

28. We conclude that there is nothing in the Act to preclude the Commission obtaining multiple extensions for referring a complaint in terms of section 50. The exception based on jurisdiction is dismissed” (footnotes omitted).’

[8] The question is whether it is competent for the Commission and a complainant to agree to the extension of any already-extended period of time. To answer this question it is necessary to consider what it is that the legislature intended the Commission and a complainant to be able to do. In terms of section 50(4)(a) the Commission and a complainant may agree “to extend the period allowed in subsection (2)” of section 50 of the Act.

[9] The applicants submitted that, because the provision makes use of the singular “*period*” as opposed to the plural “*periods*”, the period in s 50(2) “*within one year after a complaint was submitted to [the Commission]*” was contemplated. It follows, they argued, that s 50(4)(a) of the Act enables the Commission and a complainant to agree to an extension of the one-year period which begins on submission of the complaint only once. It does not enable them to reach an agreement in relation to any other period.

[10] In making this submission the applicants rely on the use of the words “as quickly as practicable” used in s 49B(3) indicating the time

within which the Commission must act upon initiating or receiving a complaint. Moreover, repeated extensions would prejudice a respondent and subject him to a continued investigation thereby impacting on its respondent's constitutional right to privacy and should therefore be narrowly construed.

[11] The Tribunal in *Sappi* appears to have been influenced by three considerations in coming to the conclusion that it did: there was nothing in the Act precluding multiple extensions; the different wording of s 14 lends support to the construction of s 50 allowing multiple extensions; and, because the purpose of s 50 is the protection of the complainant, it may agree to multiple extensions.

[12] There is some support for the Commission's contention in s 14(1)(a) where it is specifically provided that the Commission may, in intermediate merger proceedings, extend the period in which it may extend the period of consideration "by a single period not exceeding 40 business days" (and see also s 14A(2)). By not limiting the period in s 50(4) to "a single period" there is some room to argue that multiple extensions are envisaged. This argument has some weight but the two sections have different purposes and little conclusive help can be gained from a comparison. In any event, s 50(4)(b) allows the Commission to approach the Tribunal should the complainant in whose favour the provision was inserted refuse to agree to an extension.

[13] The Act has no express provision entitling the complainant and the Commission to agree to multiple extensions. The question is thus whether, on a proper construction of the provisions, such a power can be implied. The powers of the Commission are derived from the Act (s 19). The Act must be interpreted in a manner consistent with the Constitution (s 1(2)(a)) and the Constitution requires an interpretation promoting the spirit, purport and objects of the Bill of Rights (s 39(2)).

The right to privacy is one of the entrenched rights (s 14) and the applicant's right to privacy as a business will be affected by a continuing investigation by the Commission. In addition, there is an established principle of statutory interpretation which holds that, where a provision is open to two interpretations, the one which encroaches least on existing rights is to be preferred (eg *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 (A) 621F-G).

[14] Section 50 should be construed by giving the words used their literal and ordinary meaning unless it can be said that the words used are ambiguous (*Standard Bank Investment Corporation Ltd v Competition Commission and Others Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA)). When s 50(4) is considered as a whole it appears that paragraphs (a) and (b) should be read disjunctively: the subsection commences with the words "In a particular case" and this requires paragraphs (a) and (b) to be read as being mutually exclusive – hence the word "or" at the end of paragraph (b). Paragraph (a) deals with the case where there is the agreement between the complainant and the Commission and paragraph (b) with the circumstance where there is no such agreement. It follows that it is only where there is no agreement that the need to approach the Tribunal arises (of course, the agreement must have been concluded within the initial period of one year or any agreed extension since s 50 (5) would otherwise apply). A failure to agree may manifest itself either before the end of the one year period or thereafter.

[15] It seems to us that every extension agreed upon is an extension of the initial one year period. The complainant and the Commission are empowered by the very words of s 50(4)(a) to extend the period referred to in s 50(2) without limiting their power to one extension only. The fact that the singular is used in s 50(4) is not decisive: there can initially be no other period; s 50(2) refers to that one period only: every extension is an extension of that period. Moreover, the Interpretation Act 33 of 1957 provides that, “unless the contrary intention appears” words in the singular also include the plural.

[16] The applicants also object to the referral of the second complaint on the basis that the Commission referred substantially the same complaint to the Tribunal, a complaint in respect of which it had previously issued a notice of non-referral. The circumstances under which the second referral is made is set out in the Commission’s answering affidavit (paragraphs 18 ff).

[17] Two inspectors were appointed to investigate the first complaint and they identified three allegations warranting further investigation, viz. that Sasol, Nitrochem and Kynoch had engaged in market allocation as envisaged by s 4(1)(b)(ii) during a meeting in 2001; that Sasol was engaged in predatory pricing in contravention of s 8(d)(iv); and that Sasol had during 2001 reduced Nutri-Flo’s credit facility from R7 to R3 million in contravention of s 9(1). The complaint was, however, not referred to the Tribunal because insufficient evidence was found to warrant a referral.

[18] The second complaint repeated many of the allegations made in the first complaint one but, in addition, details of cost, price structures and margins were included to substantiate allegations of excessive pricing by Sasol. Kynoch and Omnia were also included as respondents. The focus of the excessive pricing complaint against Sasol relates to prices charged by Sasol during September 2003 and March 2005 and price increased in respect of LAN during January 2004 and March 2004 which were not referred to in the first complaint.

[19] At the time the Commission received the first complaint, the Commission during its investigation of and attendance of the large merger hearing between Main Street 150 (Pty) Ltd and Profert (Pty)

Ltd and Rowan Tree 16 (Pty) Ltd obtained new information and evidence pointing to the possibility of collusive practices in the fertilizer industry (see the judgment of the Tribunal of 2 December 2003 annexure NM2 to the answering affidavit paragraphs 17-27). On this basis and as a result of further memoranda the Commission decided on a thorough investigation of the alleged collusion between Sasol, Omnia and Kynoch and of Nutri-Flo's allegations of price discrimination and excessive pricing in the second complaint.

[20] The Commission decided, although it was entitled to initiate a fresh complaint under s 49B(1), rather to investigate the alleged collusion by Kynoch, Sasol and Omnia under the second complaint together with its investigation of the new allegations of excessive pricing and price discrimination by Sasol. It also intended looking afresh at the alleged practices of excessive pricing and price discrimination by Sasol which had not been investigated during the investigation of the first complaint (paragraph 24 answering affidavit).

[21] Section 67(2) protects a person against being subject to the same complaint:

‘A complainant may not be referred to the Competition Tribunal against any *firm* that has been a *respondent* in completed proceeding before the Tribunal under the same or another section of *this* Act relating substantially to the same conduct.’

The first complaint has not been referred to the Tribunal nor has any proceedings against the respondents been completed before the Tribunal. The subsection, therefore, does not apply in the present matter. Moreover, it suggests that a complaint may be referred to the Tribunal even if it is substantially the same as an earlier complaint provided that the proceedings in respect of the conduct relating to the first complaint have not been completed before the Tribunal.

[22] This raises the question who or which institution may refer a complaint to the Tribunal. Section 49B provides for the *initiation* of a

complaint by the Commission (subs (1)) and the *submission* of a complaint by any person (subs (2)). The Commission may at any time “after initiating a complaint” refer it to the Tribunal (s 50(1)). This has not occurred in the present case: the Commission neither initiated the first complaint nor referred it to the Tribunal but decided not to pursue this route but rather to refer the second complaint lodged by Nutri-Flo as expanded to the Tribunal. The question is therefore whether, assuming that the two complaints were substantially the same, the Commission’s referral was competent.

[23] A “complaint” is not defined in the Act but the Rules for the Conduct of Proceedings in the Competition Commission describe it as “(i) a matter initiated by the Commissioner in terms of section 49B(1); or (ii) a matter that has been submitted to the Commission in terms of section 49B(2)(b)”. A “prohibited practice” is a practice as defined in s 1(xxv). A complaint must obviously relate to a “prohibited practice” but must also contain information or evidence supporting the practice. This is evident from the content of the prescribed form to be used (Form CC 1) where a concise statement of the conduct as well as the dates on which the conduct occurred are required. The complaint is therefore very much defined by the facts relied upon. See *Novartis SA (Pty) Ltd v New United Pharmaceutical Distributors (Pty) Ltd (1)* (2001-2002) CPLR 74 (CAC) and *Sappi Fine Paper (Pty) Ltd v Competition Commission of SA* (2003) 2 CPLR 272 (CAC) where at 271i the question is asked “whether the second complaint is based on substantially the same conduct referred to the first respondent by the second respondent, or founded on new facts”.

Whether a complaint is the same as another is therefore a question whether it is “based on substantially the same conduct forming the basis of the initial complaint” (*Sappi* at 282D-E).

[24] Where two complaints are substantially the same the Commission would be precluded from pursuing a second complaint and making a referral in circumstances where s 67(2) applied or where the complainant refers the complaint directly to the Tribunal in terms of s 51(1). It has, however, no express power to refer a complaint that the complainant has abandoned by not referring it to the Tribunal. The only circumstance in which the Commission can do so would be where it initiates a complaint under s 49B(1) which it may refer to the Tribunal at any time (s 50(1)).

[25] The issue is whether, where the same complaint or a similar complaint is submitted by a complainant to the Commission, it can be said that the Commission is *functus officio* if it has previously decided not to investigate that particular complaint? The answer to this question must depend on the role of the Commission envisaged by the Act (see Daniel Malan Pretorius “The Origins of the *Functus Officio* Doctrine, with Specific Reference to its Application in Administrative Law” (2005) 12 *SALJ* 832 and cf *S v Singh* 1990 (1) SA 123 (A) 131H-132A). Section 21 clearly requires the Commission as one of its many functions to investigate and evaluate alleged violations of the practices proscribed by Chapter 2 of the Act. There are no provisions to be found in the Act that prevent the Commission from reconsidering a prior decision unless it does so for an ulterior motive. No such ulterior motive is contended for by the applicants nor do the papers reveal such a motive. If new facts are placed before the Commission or if new facts come to light which were not

previously known to the Commission, it is enjoined to investigate the complaint in order to properly fulfil its statutory function as the primary body responsible for prosecuting any conduct which is alleged to be prohibited by the Act. To hold otherwise would preclude the Commission from properly fulfilling its statutory function. The *functus officio* doctrine should in our view have a very limited if any application lest the very purpose envisaged by the Legislature is stultified.

[26] No evidence appears from the papers that the first decision of the Commission not to refer the dispute was preceded by a proper investigation of the allegations. Absent an ulterior motive there are only two circumstances in which the Commission is precluded from making a referral, namely, where the issue has been previously determined by the tribunal or where in consequence of the Commission's refusal to prosecute a complaint, the complainant itself is prosecuting the complaint.

[27] The second complaint is not identical to the first. Put at its highest the two complaints in some respects bear substantial similarity. In *Horowitz v Brock and others* 1988 (2) SA 160 (A) at 178I Smalberger JA stated the following:

‘the requisites of a valid defence of *res judicata* in Roman-Dutch law are that the matter adjudicated upon, on which the defence relies, must have been the same cause, between the same parties, and the same thing must have been demanded. (Voet *Commentarius ad Pandectas* 44.2.3; *Bertram v Wood* (1893) 10 SC 177 at 180; *Mitford's Executor v Ebdens Executors and Others* 1917 AD 682 at 686.) ‘

Even if the doctrine of *functus officio* or *res judicata* is to have any

application it is for Sasol to show not that the two referrals are substantially similar but that they are the same.

[28] It is common cause that the complainants are the same in both the referrals. Further that the third respondent has embodied allegations of fact that are in some measure, repeated in the second complaint but as the papers reveal, the similarity ends there. Not only new facts are relied on in making the second referral but these facts are more extensive and deal in part with events that occurred after the filing of the first complaint. Moreover, the second complaint implicates two new parties, Omnia and Kynoch. In addition new contraventions are identified which are fully ventilated in the answering affidavits of the third and fourth respondents. It will be jejune to repeat them. We are therefore satisfied that the complaints were and are temporally and qualitatively different.

[29] In the result both the applications are dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

Malan AJA et Patel AJA

I agree

Jali JA

Date of hearing	:	20 September 2005
Date of Judgment	:	28 April 2006
Counsel for Appellant	:	Adv J.J. Gauntlett (SC) Adv E. Fagan
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